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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

H & H INVESTMENT COMPANY, INC.,

Plaintiff, Cross-defendant and  
Respondent,

v.

CHIU-MING CHUNG,

Defendant, Cross-complainant and  
Appellant;

SHIH-MING HSIEH,

Cross-defendant and Appellant.

JENG-CHENG HO,

Cross-complainant and Respondent.

E046900, E047471

(Super.Ct.No. SCVSS138571)

OPINION

APPEAL from the Superior Court of San Bernardino County. John P. Wade,  
Judge. Reversed.

Orrick, Herrington & Sutcliffe LLP, Matthew H. Poppe, M. Leah Somoano, and Frank D. Rorie for Defendant, Cross-complainant, Cross-defendant and Appellants.

Eagan O'Malley & Avenatti, LLP and John C. O'Malley for Plaintiff, Cross-complainant, Cross-defendant and Respondents.

## I. INTRODUCTION

Defendant, cross-complainant and appellant Chiu-Ming Chung (Chung) appeals from a judgment entered against her in favor of plaintiff, cross-defendant, and respondent H & H Investment Company, Inc. (HHI) and cross-complainant and respondent Jeng-Cheng Ho (Ho).<sup>1</sup> Chung contends the trial court erred in allowing HHI to rescind the underlying loan transaction without restoring the consideration it received from her because rescission requires restoration of all parties to the prior status quo. Chung next contends the trial court erred in ruling that she was in privity with cross-defendant and appellant Shih-Ming Hsieh (Hsieh) in prior litigation, such that the findings in that litigation were binding on her because (1) the judgment against Hsieh in the prior litigation was based in part on the loan's continuing enforceability, so the prior judgment provided no basis for rescission of the loan; (2) there was no identity of issues between this and the prior action; and (3) no substantial evidence established that she was in privity with Hsieh. Finally, Chung contends the trial court erred in granting HHI's

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<sup>1</sup> In case No. E046900, Chung and Hsieh appealed from a judgment after an order granting summary judgment. In case No. E047471, Chung appealed from an order after judgment awarding HHI attorney fees. On this court's own motion, we consolidated those appeals.

postjudgment motion for attorney fees and costs against her because the award was duplicative and included fees unrelated to this case.

Hsieh appeals from the trial court's order permitting HHI and Ho to recover attorney fees from him under the doctrine of "tort of another" because that doctrine may not be used to force one joint tortfeasor to pay attorney fees incurred in suing another tortfeasor, and HHI and Ho alleged that Hsieh and Chung were joint tortfeasors.

We conclude the trial court erred in granting rescission in favor of HHI because it was not established in the prior action that the parties had been restored to the prior status quo. Because the judgment must therefore be reversed, the issue of the propriety of the attorney fee awards against Chung and Hsieh is moot.

## II. FACTS AND PROCEDURAL BACKGROUND

### **A. Underlying Transaction and Prior Lawsuit**

Some of the general background facts are taken from the opinion of the Second District Court of Appeal affirming judgment against Hsieh in a prior action<sup>2</sup> and from the trial court's statement of decision in that action.

"This appeal involves two families and one golf course.

"Appellant Shih-Ming Hsieh is married to the older sister of respondent Jeng-Cheng Ho, making them brothers-in-law. Hsieh is an industrialist who lives in Taiwan. Ho is a dentist who lives in Southern California. The two men and their wives own H&H

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<sup>2</sup> *Hsieh v. Ho* (Sept. 21, 2006, B182550) [nonpub. opn.].

Investment Co., Inc. (HHI), a closely held corporation in which each couple owns 50 percent of the company's stock.

“In 1991, HHI bought the Colton Golf Course for \$6.5 million. The seller financed the sale by taking back a \$4.5 million note at an interest rate of 9 percent. In 1994, Hsieh arranged for HHI to refinance the golf course in order to pay off the seller's note. As Hsieh's counsel later explained, Hsieh ‘was responsible in particular for obtaining the loans that replaced . . . the seller financing. . . . [H]is responsibility was to supervise the loan transactions and make sure they went according to plan.’

“Under the refinancing, Tonical Investments, Ltd., an entity Hsieh controlled, borrowed \$4.5 million from BNP Paribas. Tonical paid BNP Paribas a variable interest rate on the loan ranging from 1.75 to 3 percent. Tonical then transferred the money to Hsieh's daughter-in-law, Chung Chiu Ming, who lived with Hsieh. Chung lent the money to HHI, charging HHI 9 percent interest. Ho did not know about the BNP loan and did not know it was the source of Chung's loan to HHI. Over the life of the loan, HHI paid \$3 million – of which Ho contributed half – in interest-only payments to Chung.” (*Hsieh v. Ho, supra*, B182550 at p. 2.)

In July 2002, Hsieh filed an action in the Los Angeles County Superior Court (*Hsieh v. Ho*, case No. BC277555), alleging that Ho had mismanaged the company. Ho and HHI filed a cross-complaint against Hsieh alleging that Hsieh had defrauded Ho and HHI in connection with the loan transaction. Ho claimed Hsieh had failed to disclose

“that he controlled Tonical and was skimming for his personal use HHI’s repayments to Tonical.” Chung was not a party to either action, nor did she testify.

The case was tried to a referee. Before trial, the referee imposed evidentiary sanctions against Hsieh for failure to produce documents during discovery. After trial, the referee found that Hsieh was not credible, but Ho was. “The referee found Hsieh had set up the refinancing loan to benefit himself and defraud HHI and Ho, and had concealed the loan’s true nature by telling Ho it was all one loan. The referee concluded Hsieh had damaged Ho by at least the amount Ho had paid toward the loan, which was \$1,512,322.50.” (*Hsieh v. Ho, supra*, B182550 at p. 3.) The referee also found Hsieh liable for punitive damages in the amount of \$6 million. The trial court accepted the referee’s findings and entered judgment in favor of Ho. (*Id.* at p. 4.)

In its statement of decision in the Los Angeles action, the trial court found: “The evidence is abundantly clear that Hsieh structured, managed and facilitated the loan transactions. . . . The portfolio loan would be structured from BNP to the Tonical Corporation controlled by Hsieh, in the amount of \$4.5 million at 2% interest. Loan proceeds were then transferred to Chung, Hsieh’s daughter-in-law, who lived in Hsieh’s home. Chung then loaned \$4.5 million to HHI, at 9% interest. . . . [¶] . . . Hsieh further testified that he had in fact arranged two separate loans, one from BNP to Tonical Chung, the second from Chung to HHI. Although the BNP loan was paid off, the loan from Chung to HHI remained outstanding. Further, the BNP payoff did not release the collateral held by Chung against HHI. [¶] . . . [¶] . . . Hsieh knew his representation was

false; Hsieh intended the Chung loan would require Ho to repay a second loan balance; Ho made payments in reliance on the trust reposed in Hsieh, including the representations that it was all one loan; and as a result, Ho now has an obligation outstanding on the Chung loan, and in addition collateral that has not been released. [¶] Further, in carrying out his loan scheme, Hsieh committed other fraudulent acts along the way. Hsieh told Ho that he would determine distribution of the payment of the Chung loan balance. Yet, Hsieh failed to identify and document the transaction openly, failed to render proper accountings, and set up a loan structure in which the loan balance would be repaid to Chung and then inure to his benefit, all of which constitute related grounds on which Hsieh defrauded Ho. As a result of Hsieh's fraudulent loan machinations, Ho and HHI have suffered damages of at least \$1.5 million dollars, equal to the minimum amount Ho paid towards the shareholder loan. The referee finds that clear and convincing evidence was presented that these fraudulent acts were committed intentionally, with a specific design to cause financial harm to Ho and HHI and to benefit Hsieh and his family."

"By failing to identify and document the transaction openly, failing to render proper accountings, and setting up a scheme whereby a second balance would be repaid to his daughter-in-law Chung, inuring to Hsieh's benefit, his actions amounted to fraud."

The court awarded Ho compensatory damages of \$1,512,323, prejudgment interest of \$630,484, punitive damages of \$6 million, and attorney and arbitration fees of \$150,728. On appeal, the court affirmed the judgment.

## **B. Current Action**

In 2006, HHI sued Chung to quiet title and for declaratory relief. HHI alleged that Hsieh and Chung had conspired to create a fraudulent dual loan scheme, and HHI therefore had the right to expunge the lien. Chung filed an answer denying most of the material allegations of the complaint, including the allegations of fraud.

Chung filed a cross-complaint against HHI and Ho for judicial foreclosure, foreclosure on equitable lien, unjust enrichment, and fraud. HHI and Ho filed an answer containing a general denial and affirmative defenses.

HHI and Ho filed a cross-complaint against Hsieh for equitable indemnity, contribution, declaratory relief, and implied contractual indemnity. HHI and Ho again alleged Chung had conspired with Hsieh to create a fraudulent dual loan scheme. Hsieh filed an answer containing a general denial and affirmative defenses.

HHI and Ho moved for judgment on the pleadings against Chung to prevent foreclosure. They argued that the prior judgment against Hsieh had a collateral estoppel effect, and the findings of fraud against Hsieh in that action made the loan transaction voidable as to Chung. The trial court took judicial notice of the rulings in the prior action. The trial court granted the motion for judgment on the pleadings, holding that the prior action “clearly established that Hsieh procured the Chung loan through fraud. A loan obtained through fraud and the deed securing it may be rescinded and the title reclaimed by the grantor.” The court further held that Chung was bound by the judgment in the prior action because she was “obviously [Hsieh’s] puppet in these transactions”

and was thus in privity with Hsieh for purposes of collateral estoppel. Chung moved for reconsideration, but the trial court denied the motion.

HHI then filed a motion for judgment on the pleadings and/or summary adjudication against Chung on the same bases as asserted in the prior motion. The trial court granted the motion ““based upon the principles of res judicata and collateral estoppel and in holding with the Court’s decision on the prior motion for judgment on the pleadings.””

The trial court entered judgment against Chung providing that:

“1. The Chung Deed of Trust . . . is rescinded;

“2. Title to the Property is quieted and shall reflect that any and all liens placed against the Property by Chung are hereby void;

“3. Chung shall take nothing by way of her Cross-Complaint against HHI or Dr. Ho . . . .” The court also held that HHI and Ho were entitled to attorney fees and costs.

HHI and Ho filed a motion for summary judgment or summary adjudication against Hsieh, arguing he should pay their attorney fees incurred in this action under the tort-of-another doctrine. The trial court granted the motion. HHI, Ho, and Hsieh thereafter stipulated to a \$40,000 fee award, subject to Hsieh’s right to contest the award on appeal and HHI and Ho’s right to seek additional fees from Chung. The trial court entered judgment against Hsieh in that amount.



HHI filed a motion for contractual attorney fees against Chung based on the fee provision in the promissory note associated with the \$4.5 million loan. The trial court granted the motion and awarded fees in the full amount requested of \$118,962.65.

### III. DISCUSSION

#### **A. Collateral Estoppel Effect of Findings in Los Angeles Action**

Chung contends the trial court erred in allowing HHI to rescind the transaction without restoring the consideration it received. The trial court held that “[t]he prior litigation involved the propriety of the Chung loan transaction,” and because the prior action “established that Hsieh procured the Chung loan through fraud,” the loan and the trust “deed securing it may be rescinded and the title reclaimed by the grantor.”

##### *1. Standard of Review*

The trial court’s challenged rulings arose in the context of a motion for judgment on the pleadings and a motion for summary adjudication. Both rulings are therefore subject to de novo review. “The standard of review for a motion for judgment on the pleadings is the same as that for a general demurrer: We treat the pleadings as admitting all of the material facts properly pleaded, but not any contentions, deductions or conclusions of fact or law contained therein. We may also consider matters subject to judicial notice. We review the complaint de novo to determine whether it alleges facts sufficient to state a cause of action under any theory.” (*Dunn v. County of Santa Barbara* (2006) 135 Cal.App.4th 1281, 1298.) Similarly, we use a de novo standard of review for

a ruling granting summary judgment. (*Wachovia Bank v. Lifetime Industries, Inc.* (2006) 145 Cal.App.4th 1039, 1048 [Fourth Dist., Div. Two].)

## *2. Requirements for Collateral Estoppel to Apply*

“Collateral estoppel precludes the relitigation of an issue only if (1) the issue is identical to an issue decided in a prior proceeding; (2) the issue was actually litigated; (3) the issue was necessarily decided; (4) the decision in the prior proceeding is final and on the merits; and (5) the party against whom collateral estoppel is asserted was a party to the prior proceeding or in privity with a party to the prior proceeding. [Citation.]’ [Citation.]” (*Plumley v. Mockett* (2008) 164 Cal.App.4th 1031, 1048-1049.) A party asserting collateral estoppel has the burden of proof as to each element of that doctrine (*Pacific Lumber Co. v. State Water Resources Control Bd.* (2006) 37 Cal.4th 921, 943), and that burden has been described as “heavy” (*Kemp Bros. Construction, Inc. v. Titan Electric Corp.* (2007) 146 Cal.App.4th 1474, 1482). “[T]he law does not favor estoppels.” . . . “[c]ertainty is an essential element of every estoppels . . .” [Citation.] Thus, where a party asserts “a certain question in issue has been litigated and determined between the same parties in a previous action, it is not enough that the proposed evidence tends to show that the precise question may have been involved in such litigation.” [Citation.] In other words, “[e]very estoppel must be certain to every intent, and not to be taken by argument or inference.” [Citation.] ‘If upon the fact of a record anything is left to conjecture as to what was necessarily involved and decided, there is no estoppel in

it when pleaded, and nothing conclusive in it when offered in evidence.’ [Citation.]”””  
(*Ibid.*)

### 3. *Issues Determined in Prior Action*

Chung contends the trial court erred in allowing HHI to rescind the loan without restoring the consideration it received.

In its verified complaint to quiet title and for declaratory relief, HHI alleged it had made full payment on the Chung loan. Chung denied that allegation. Chung contends HHI made “interest-only” payments totaling \$3 million.

In the prior action, Ho produced evidence that “he paid over \$3 million in interest and paydown of the loan balance,” and the trial court found that “[s]ince the inception of the loans in 1994 . . . . Ho paid over \$3 million in interest and principal on the loan balance[.]” The statement of decision stated that from 1994 to 2000, Hsieh had reduced the principal balance on the BNP loan from \$4.5 million to \$3.75 million and “the balance was fully paid by Hsieh, about March, 2003.”

It was undisputed that HHI received \$4.5 million from Chung. HHI and Ho have made no assertion and have pointed to no evidence that *they* made any payments on the Chung loan or the BNP loan other than the \$3 million. Rather, they assert that the \$4.5 million loan from BNP *has been repaid*, without identifying who repaid that loan. Moreover, no finding was made in the underlying action as to “the true balance remaining on the Chung loan[.]” Even if the entire \$3 million were deemed principal, that amount is less than the amount of the Chung loan.

“The very definition of rescission is ‘to ‘restore the parties to their former position.’ [Citation.]” (*Sharabianlou v. Karp* (2010) 181 Cal.App.4th 1133, 1147.) Plaintiffs are not entitled to a windfall as the result of the rescission. (*Gardiner Solder Co. v. SupAlloy Corp., Inc.* (1991) 232 Cal.App.3d 1537, 1543.) Because the issue of restoration of benefits was not addressed in the underlying action, the collateral estoppel doctrine does not apply. (See *Plumley v. Mockett, supra*, 164 Cal.App.4th at pp. 1048-1049.) “Unless the issue or cause of action in the two actions is identical, the first judgment does not stand as a bar to the second suit. [Citations.]” (*Citizens for Open Access Etc. Tide, Inc. v. Seadrift Assn.* (1998) 60 Cal.App.4th 1053, 1067.)

#### **B. Attorney Fees Awards**

Because we have determined that the judgment against Chung must be reversed, the issues concerning the propriety of the attorney fee awards are moot.

#### **IV. DISPOSITION**

The judgment is reversed. Chung and Hsieh shall recover their costs on appeal.

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HOLLENHORST

J.

We concur:

RAMIREZ

P.J.

MCKINSTER

J.